

STATE OF MICHIGAN
IN THE SUPREME COURT

In re: Estate of Olive Rasmer

Supreme Court No. 153356

MICHIGAN DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Court of Appeals No. 326642

Delta Probate Court
No. 14-49740-CZ

Plaintiff-Appellee,

v

RICHARD RASMER, Personal
Representative of the Estate of OLIVE
RASMER, DECEASED,

Defendants-Appellant.

**APPELLEE MICHIGAN DEPARTMENT OF HEALTH AND HUMAN
SERVICES' BRIEF IN OPPOSITION TO APPELLANT'S APPLICATION
FOR LEAVE TO APPEAL**

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. MCL 400.112g(7) provides the only statutory requirement for the Department to give written information about estate recovery to beneficiaries of Medicaid long-term care. At reapplication, Richard Rasmer certified that he had received and reviewed information about the estate recovery program when he sought continuing eligibility for Medicaid benefits for Olive Rasmer. Did the Court of Appeals correctly determine that Olive Rasmer had received sufficient and timely notice of estate recovery?

Appellant's answer: No.

Appellee's answer: Yes.

Trial court's answer: No.

Court of Appeals' answer: Yes.

Authority: *In re Estate of Keyes*, 310 Mich App 266 (2015)

2. Before the State takes property from someone who has a constitutionally protected interest there must be a meaningful opportunity to be heard and appropriate notice of that hearing. The Estate of Olive Rasmer had notice and the opportunity to dispute the validity of the State's claim in both probate court and the Court of Appeals and unquestioned notice of those hearings. Did the opportunity for these hearings satisfy the constitutional requirements of due process?

Appellant's answer: No.

Appellee's answer: Yes.

Trial court's answer: No.

Court of Appeals' answer: Yes.

Authority: *In re Estate of Keyes*, 310 Mich App 266 (2015)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

US Const Amend XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC § 1396a. State plans for medical assistance

(a) Contents

A State plan for medical assistance must—

* * *

(18) comply with the provisions of section 1396p of this title with respect to liens, adjustments and recoveries of medical assistance correctly paid

42 USC § 1396c. Operation of State plans

If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this subchapter, finds—

(1) that the plan has been so changed that it no longer complies with the provisions of section 1902 [42 USC § 1396a]; or

(2) that in the administration of the plan there is a failure to comply substantially with any such provision;

the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

42 USC § 1396p. Liens, adjustments and recoveries, and transfers of assets

(b) Adjustment or recovery of medical assistance correctly paid under a State plan.

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:

(A) In the case of an individual described in subsection (a)(1)(B) of this section, the State shall seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.

(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of—

(i) nursing facility services, home and community-based services, and related hospital and prescription drug services, or

(ii) at the option of the State, any items or services under the State plan (but not including medical assistance for Medicare cost-sharing or for benefits described in section 1396a(a)(10)(E) of this title).

Const 1963, Art I, § 17

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations, and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

MCL 400.112g. Michigan medicaid estate recovery program; establishment and operation by department of community health; development of voluntary estate preservation program; report; establishment of estate recovery program; waivers and approvals; duties of department; lien.

(1) Subject to section 112c(5), the department of community health shall establish and operate the Michigan medicaid estate recovery program to comply with requirements contained in section 1917 of title XIX. The department of community health shall work with the appropriate state and federal departments and agencies to review options for development of a voluntary estate preservation program. Beginning not later than 180 days after the effective date of the amendatory act that added this section and every 180 days

thereafter, the department of community health shall submit a report to the senate and house appropriations subcommittees with jurisdiction over department of community health matters and the senate and house fiscal agencies regarding options for development of the estate preservation program.

- (2) The department of community health shall establish an estate recovery program including various estate recovery program activities. These activities shall include, at a minimum, all of the following:
 - (a) Tracking assets and services of recipients of medical assistance that are subject to estate recovery.
 - (b) Actions necessary to collect amounts subject to estate recovery for medical services as determined according to subsection (3)(a) provided to recipients identified in subsection (3)(b). Amounts subject to recovery shall not exceed the cost of providing the medical services. Any settlements shall take into account the best interests of the state and the spouse and heirs.
 - (c) Other activities necessary to efficiently and effectively administer the program.
- (3) *The department of community health shall seek appropriate changes to the Michigan medicaid state plan and shall apply for any necessary waivers and approvals from the federal centers for medicare and medicaid services to implement the Michigan medicaid estate recovery program. The department of community health shall seek approval from the federal centers for medicare and medicaid regarding all of the following:*
 - (a) Which medical services are subject to estate recovery under section 1917(b)(1)(B)(i) and (ii) of title XIX.
 - (b) Which recipients of medical assistance are subject to estate recovery under section 1917(a) and (b) of title XIX.
 - (c) Under what circumstances the program shall pursue recovery from the estates of spouses of recipients of medical assistance who are subject to estate recovery under section 1917(b)(2) of title XIX.
 - (d) What actions may be taken to obtain funds from the estates of recipients subject to recovery under section 1917 of title XIX, including notice and hearing procedures that may be pursued to contest actions taken under the Michigan medicaid estate recovery program.
 - (e) *Under what circumstances the estates of medical assistance recipients will be exempt from the Michigan medicaid estate recovery program because of a*

hardship. At the time an individual enrolls in medicaid for long-term care services, the department of community health shall provide to the individual written materials explaining the process for applying for a waiver from estate recovery due to hardship. The department of community health shall develop a definition of hardship according to section 1917(b)(3) of title XIX that includes, but is not limited to, the following:

- (i) An exemption for the portion of the value of the medical assistance recipient's homestead that is equal to or less than 50% of the average price of a home in the county in which the medicaid recipient's homestead is located as of the date of the medical assistance recipient's death.
 - (ii) An exemption for the portion of an estate that is the primary income-producing asset of survivors, including, but not limited to, a family farm or business.
 - (iii) A rebuttable presumption that no hardship exists if the hardship resulted from estate planning methods under which assets were diverted in order to avoid estate recovery.
- (f) The circumstances under which the department of community health may review requests for exemptions and provide exemptions from the Michigan medicaid estate recovery program for cases that do not meet the definition of hardship developed by the department of community health.
 - (g) Implementing the provisions of section 1396p(b)(3) of title XIX to ensure that the heirs of persons subject to the Michigan medicaid estate recovery program will not be unreasonably harmed by the provisions of this program.
- (4) The department of community health shall not seek medicaid estate recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state.
 - (5) The department of community health shall not implement a Michigan medicaid estate recovery program until approval by the federal government is obtained.
 - (6) The department of community health shall not recover assets from the home of a medical assistance recipient if one or more of the following individuals are lawfully residing in that home:
 - (a) The medical assistance recipient's spouse.

- (b) The medical assistance recipient's child who is under the age of 21 years, or is blind or permanently and totally disabled as defined in section 1614 of the social security act, 42 USC 1382c.
 - (c) The medical assistance recipient's caretaker relative who was residing in the medical assistance recipient's home for a period of at least two years immediately before the date of the medical assistance recipient's admission to a medical institution and who establishes that he or she provided care that permitted the medical assistance recipient to reside at home rather than in an institution. As used in this subsection, "caretaker relative" means any relation by blood, marriage, or adoption who is within the fifth degree of kinship to the recipient.
 - (d) The medical assistance recipient's sibling who has an equity interest in the medical assistance recipient's home and who was residing in the medical assistance recipient's home for a period of at least one year immediately before the date of the individual's admission to a medical institution.
- (7) *The department of community health shall provide written information to individuals seeking medicaid eligibility for long-term care services describing the provisions of the Michigan medicaid estate recovery program, including, but not limited to, a statement that some or all of their estate may be recovered.*
[Emphasis added.]

MCL 400.112k. Applicability of program to certain medical assistance recipients.

The Michigan medicaid estate recovery program shall only apply to medical assistance recipients who began receiving medicaid long-term care services after the effective date of the amendatory act that added this section.

**COUNTER-STATEMENT OF JUDGMENT /
ORDER APPEALED FROM AND RELIEF SOUGHT**

The Estate of Olive Rasmer seeks leave to appeal the opinion of the Court of Appeals in Docket No. 326642, one of four cases consolidated and decided as *In re Gorney*, ___ Mich App ___, (issued Feb 4, 2016). The *Gorney* Court determined that pursuant to MCL 400.112g(3) and (7), the notice about estate recovery provided to Olive Rasmer in her reapplication was timely and sufficient and her Estate was subject to estate recovery. *Id.* at ___, slip op at 1. This same interpretation of 400.112g, is in accord with in *In re Estate of Keyes*, 310 Mich App 266, (2015), *In re Estate of Ketchum*, ___ Mich App ___, slip op at ___; (issued Mar 1, 2016); and in *In re Estate of Clark*, unpublished opinion per curiam of the Court of Appeals, issued May 28, 2015 (Docket No. 320720)¹. Under the governing decision of the *Keyes* Court, the Estate received a hearing with sufficient notice, and there was no due-process violation. *Gorney*, ___ Mich App at ___, slip op at 2, 6; *Keyes*, 310 Mich App at 272-273.

The Rasmer Estate now applies for leave to appeal the *Gorney* decision, asserting that Olive Rasmer's due process rights were violated because she did not receive notice of estate recovery at the time of her initial enrollment. (Estate's App for lv, p 1.) This is not related to the due process issue in the Department's

¹ *Clark*, attached as Exhibit A, is included in the analysis because estate recovery is a new issue to the courts, and *Clark* is in accord with the three other cases decided by the Court of Appeals on this issue.

application for leave to appeal in the *Gorney* case, submitted to this Court on March 17, 2016.

REASONS FOR DENYING THE APPLICATION

The Estate is requesting that this Court reverse the *Gorney* decision and affirm the trial court opinion to hold that the due process rights of the Estate of Olive Rasmer were violated by allowing the estate recovery program to recover Medicaid benefits paid before Olive Rasmer received the information on the application. Reversing this decision would effectively overturn major portions of four Court of Appeals cases: *Gorney*; *Keyes*; *Clark, unpubl*; and *In re Estate of Ketchum*, ___ Mich App ___ (issued Mar 1, 2016). This Court has already denied the *Keyes* application for leave to appeal to this Court, a case with the same issue and almost identical facts. (*Keyes*, lv den, April 16, 2016).

In four decisions, the Court of Appeals rejected the argument that MCL 400.112g(3)(e) requires notice at the time of enrollment, as opposed to notice when the individual seeks Medicaid eligibility, because “[s]ubsection (3)(e) is part of the larger Subsection (3), which requires the Department to seek approval from the federal government regarding the items listed in the subdivisions.” *Keyes*, 310 Mich App at 272; *Gorney*, ___ Mich App ___; slip op at 5; *In re Estate of Ketchum*, ___ Mich App at ___, slip op at 10; *Clark unpub*, op at 7. Recognizing this context, the *Gorney* Court correctly held in this case that an applicant who seeks Medicaid long-term care benefits after receiving the written information printed on the application has received timely and sufficient notice for estate recovery and that related to the timing and sufficiency of notice there was no due process violation. *Gorney*, ___ Mich App ___; slip op at 1, 6. *Keyes*, 310 Mich App at 268, 272-273, 275.

Congress mandated that states seek recovery of Medicaid payments from the beneficiary's estate to assist in financing this expensive program so that benefits will be available for future applicants. In order to offset costs, estate recovery reasonably requires the estates of Medicaid beneficiaries without spouses or dependents to repay all or some of the public benefits when assets remain in the estate after claims of higher priority. The Rasmer Estate seeks to avoid this requirement by misreading MCL 400.112g and conflating statutory and due-process notice issues despite clear explanation of this portion of statute by the Court of Appeals. *Gorney*, ___ Mich App at ___, slip op at 5-6; *Keyes*, 310 Mich App at 272; *Ketchum*, ___ Mich App at ___, slip op at 9-10; *Clark*, unpub at 7. The Rasmer Estate objects to this repayment even though the estate recovery statute making her estate subject to estate recovery, MCL 400.112k was in effect since 2007 and even though Olive Rasmer was directly informed about estate recovery when she was seeking continued benefits for her nursing home care. After expressly acknowledging that notice, she still chose to apply without altering her property or assets.

The application for leave to appeal fails to state grounds warranting review under MCR 7.302(B). There is no question regarding the validity of a legislative act, only its interpretation. MCR 7.302(B)(1). And although this is a case against a state agency, it lacks significant public interest because it implicates only those individuals who began long-term care before 2012 and have estates large enough to recoup the entire amount of Medicaid expenses paid, so any decision will have very limited application. MCR 7.302(B)(2) & (3). Finally, the decision in this matter was

carefully reasoned and correct and does not conflict with any decision of this Court or of the Court of Appeals. MCR 7.302(5). The application should be denied.

COUNTER-STATEMENT OF FACTS

Federal and state law require that the Department pursue estate recovery in the estates of beneficiaries of Medicaid long-term care benefits. 42 USC 1396p(b)(1)(B); MCL 400.112g-k. Failure to conform to federal law risks the loss of federal funding for Michigan's Medicaid programs. 42 USC 1396c; 42 CFR 430.30. Olive Rasmer began long-term care in 2009 and applied for Medicaid to pay the cost of her nursing home expenses. (Estate's App for lv, p 1). She was over the age of 55, and she began receiving long-term care benefits after June 30, 2007. Under 42 USC 1396p(b)(1)(B) and MCL 400.112k, her Estate is subject to estate recovery.

Olive Rasmer received written information about the estate recovery program at the time of her yearly reapplication for benefits in both September 2012 and September 2013 when applications were mailed to the home of her authorized representative Gayle S. Dore. 12-23-2014 Dept Mot, Exh A (Affidavit). On September 30, 2013, Gayle S. Dore certified with her signature that she had "received and reviewed" the following information:

I understand that upon my death the Michigan Department of Community Health has the legal right to seek recovery from my estate for services paid by Medicaid. MDCH will not make a claim against the estate while there is a legal surviving spouse or a legal surviving child who is under the age of 21, blind, or disabled living in the home. An estate consists of real and personal property. Estate Recovery only applies to certain Medicaid recipients who received Medicaid after the implementation date of the program. MDCH may agree not to pursue recovery if an undue hardship exists. For further information

regarding Estate Recovery call 1-877-791-0435. 12-23-2014 Dept Mot, Exh B (Application).

After receiving the notices, Olive Rasmer, by her authorized representative, submitted applications seeking continuing Medicaid long-term care benefits to pay the cost of Olive Rasmer's nursing home care. On Olive Rasmer's behalf, for long-term care, taxpayers paid \$178,133.02. Her Estate is subject to estate recovery.

Keyes, 310 Mich App at 391-92; *Gorney*, ___ Mich App at ___, slip op at 6.

PROCEEDINGS BELOW

After Olive Rasmer's death, the Department filed its Medicaid estate recovery claim as required by federal law. (Def Mot, Br p 2.) 42 USC 1396p(b). Richard Rasmer, as personal representative for the Estate, disallowed the Department's claim with no explanation, and the Department filed its civil action to preserve that claim. (Appellee/Estate App for Lv, p 1); MCL 700.3804.

In the probate court case the Department filed a motion for summary disposition asking the court to allow the Department's estate recovery claim, and the Estate filed a counter-motion for summary disposition. *Id.* The trial court granted summary disposition to the Estate, ruling "that the estate did not receive sufficient statutory notice." (Dec and Order, 2/18/2015.) Based on this reasoning, the trial court completely barred estate recovery in the Estate of Olive Rasmer. *Id.* The Department filed a timely claim of appeal on May 4, 2015. The Court of Appeals reversed, finding that the Department had provided the estate with sufficient and timely notice. *Gorney*, ___ Mich App at ___, slip op at 6; citing *Keyes*, 310 Mich App at 273.

ARGUMENT

I. **Because Olive Rasmer received timely and sufficient notice of estate recovery, there is no due process violation.**

A. **Standard of Review**

This Court reviews *de novo* issues of statutory interpretation. *In re Harper*, 302 Mich App 349, 352 (2013).

B. **Analysis**

The Estate misinterprets MCL 400.112g(3), misreading the text and taking portions out of context, to support its claim that the Estate did not receive the correct notice because she was not informed of estate recovery “at enrollment.” Four times the Court of Appeals has examined this section of law, and each time came to the same conclusion, which leads to the clear and unambiguous result that Olive Rasmer *did* receive sufficient and timely information. *Keyes*, 310 Mich App at 391-92; *Ketchum*, __ Mich App at __, slip op at 9-10; *Gorney*, __ Mich App at __, slip op at 6; *Clark*, unpub at 7-8.

The Rasmer Estate further claims that its due process rights were violated because the Department sought recovery of amounts paid before the Estate received notice. (Estate’s App for lv, p ii.) The Court of Appeals has consistently rejected this argument. *Keyes*, 310 Mich App at 274-275; *Gorney* __ Mich App at __, slip op at 7. (“This Court rejected a due process challenge identical to one prong, related to notification at time of enrollment.”) And this Court previously denied leave on this issue. *In re Estate of Keyes*, 498 Mich 968 (2016).

1. The Estate of Olive Rasmer is subject to estate recovery.

Because Olive Rasmer was over the age of 55 and began receiving Medicaid long-term care benefits after September 30, 2007, her Estate is subject to estate recovery under both federal and state law. 42 USC 1396p(b)(1) provides:

the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:

(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance.

MCL 400.112k provides:

The Michigan medicaid estate recovery program shall only apply to medical assistance recipients who began receiving medicaid long-term care services after the effective date of the amendatory act that added this section.

A court must “give the words of a statute their plain and ordinary meaning,” *Pohutski v City of Allen Park*, 465 Mich 675, 683 (2002); and must “apply the language of the statute as enacted, without addition, subtraction, or modification.” *Lesner v Liquid Disposal*, 466 Mich 95, 101-02 (2002). Because Olive Rasmer was over the age of 55 and began receiving long-term care benefits from Medicaid after September 30, 2007, her estate is subject to estate recovery. MCL 400.112k; 42 USC 1396(b).

2. The Department provided all written information about estate recovery that is required by statute.

No federal law or regulation requires the Department to provide any type of notice about estate recovery. Michigan law, however, does require the Department

to provide “written information” describing the estate recovery program to individuals seeking eligibility for benefits. MCL 400.112g(7) provides:

The department of community health shall provide written information to individuals seeking Medicaid eligibility for long-term care services describing the provisions of the Michigan Medicaid estate recovery program, including, but not limited to, a statement that some or all of their estate may be recovered.

There is no timing provision in this section of law – the courts found that “the Legislature’s decision not to use the word ‘enrollment’ in Subsection (7) was intentional.” *Gorney*, ___ Mich App at __, slip op at 6, quoting *Keyes*, 310 Mich App at 273.

Oliver Rasmer received the following information when she filed a reapplication seeking Medicaid eligibility for long-term care services:

I understand that upon my death the Michigan Department of Community Health has the legal right to seek recovery from my estate for services paid by Medicaid. MDCH will not make a claim against the estate while there is a legal surviving spouse or a legal surviving child who is under the age of 21, blind, or disabled living in the home. An estate consists of real and personal property. Estate Recovery only applies to certain Medicaid recipients who received Medicaid after the implementation date of the program. MDCH may agree not to pursue recovery if an undue hardship exists. For further information regarding Estate Recovery call 1-877-791-0435. [*Id.* at __, slip op at 4.]

The *Gorney* Court held that notice was not required “at enrollment” and “that notice in these matters was statutorily sufficient and the probate courts erred in concluding otherwise.” *Id.* at __, slip op at 6; *Keyes*, 310 Mich App at 272-273.

MCL 400.112g(7) is the *only* statutory provision requiring such notice. *Keyes*, 310 Mich App at __. There is no requirement to provide notice in § 112g(3). See *Keyes*, 310 Mich App at 272-273; *Gorney*, ___ Mich App at __, slip op at 6; *Clark*,

unpubl at 8. The Estate, however, argues that despite the holdings of *Keyes*, *Ketchum*, *Gorney* and *Clark* to the contrary, “[t]he process to which Ms. Rasmer was due was, by statute, that notice of recovery be given to her as of the time of her enrollment.” (Appellee/Estate Lv for App, p 4.) This is their basis to assert that the Estate’s due process rights were violated.

To find the statutory notice that the Estate needs to make its case requires disregarding the entire introductory paragraph of MCL 400.112g(3), written by the Legislature to explain how the provisions that followed were to be treated, taking a section out of context and misreading the actual phrase that they are relying on. The pertinent portion of MCL 400.112g(3)(e) provides:

(3) The department of community health shall seek appropriate changes to the Michigan medicaid state plan and shall apply for any necessary waivers and approvals from the federal centers for medicare and medicaid services to implement the [MMERP]. The department of community health shall seek approval from the federal centers for medicare and medicaid regarding all of the following:

* * *

(e) Under what circumstances the estates of medical assistance recipients will be exempt from the [MMERP] because of a hardship. At the time an individual enrolls in medicaid for long-term care services, the department of community health shall provide to the individual written materials explaining the process for applying for a waiver from estate recovery due to hardship.

Our courts examined these issues and consistently held that “Subsection (3)(e) is part of the larger Subsection (3), which requires the Department to seek approval from the federal government regarding the items listed in the subdivisions.”

Gorney, __ Mich App at __, slip op at 5; quoting *Keyes*, 310 Mich App at 272–273; see *Ketchum* __ Mich App at __, slip op at 8-10; *Clark*, unpub at __.

Although the *Gorney* decision was not per curiam, there was no disagreement on this issue. The Court rejected the estate’s argument that MCL 400.112g(3)(e) provided a specific requirement that DHHS provide certain notices about estate recovery to Medicaid applicants, holding that § 112g(3)(e) simply required the department to seek approval of certain provisions from the federal government in developing the estate recovery program. *Ketchum* __ Mich App at __, slip op at 9-10, citing *Keyes*, 310 Mich App at 268, 272.

The Rasmer Estate is not alleging that the Department did not “seek approval from the federal government,” which is all that MCL 400.112g(3) and its provisions require. In fact, the *Ketchum* Court held that the Department *did* seek approval for required provisions. *Ketchum*, __ Mich App at __, slip op at 10-11.

Even the phrase that the Rasmer Estate relies on does not mention information about estate recovery other than “applying for a hardship waiver.” MCL 400.112g(3)(e). And the Rasmer Estate and Personal Representative, Richard Rasmer, have never indicated any interest in seeking a hardship waiver.

II. The Estate of Olive Rasmer was provided a hearing and sufficient notice of that hearing, and there has been no due process violation related to the timing or sufficiency of notice.

A. Standard of Review

The determination of whether a party has been afforded due process is a question of law subject to *de novo* review on appeal. *In re Carey*, 241 Mich App 222, 225-226; 615 NW2d 742 (2000).

B. Analysis

The Rasmer Estate has asserted the claim of violation of its due process and states as the basis of that claim, “[t]he due process to which Ms. Rasmer was due, was by statute, that notice of estate recovery be given to her as of the time of her enrollment.” But there is no section of statute that requires the Department to provide that “notice of estate recovery be given to her as of the time of her enrollment.” And her Estate has been afforded the opportunity to be heard on the matter before a competent tribunal and has received sufficient notice such that the Estate has briefed and appeared for those hearing.

1. The Estate of Olive Rasmer has been accorded all due process.

“The Fourteenth Amendment to the United States Constitution and Article I, § 17 of the Michigan Constitution provide that the state shall not deprive a person of life, liberty, or property without due process of law.” *Gorney*, ___ Mich App at ___, slip op at 5, quoting *Keyes*, 310 Mich App at 274-275; *Elba Twp v Gratiot Co Drain Comm’r*, 493 Mich 265, 288 (2013). Due process of law requires only a fair

hearing before an impartial decision maker and adequate notice of the hearing.

Hinky Dinky Supermarket, Inc v Dep't of Community Health, 261 Mich App 604, 606 (2004). The Rasmer Estate has already had two hearings and was sufficiently advised of both. The *Gorney* court, relying on *Keyes*, rejected the estates' due process challenges based on the lack of notice in the original application. *Gorney*, __ Mich App at __, slip op at 8. "The estates had the same opportunity [as *Keyes*] to contest the estate recovery claims in the probate court, and therefore received the notice and opportunity to be heard required to satisfy due process." *Id.*

The Rasmer Estate cites *Dow v State of Michigan*, 396 Mich 202, 205 (1976), to support its claim of violation of due process. That case, however, bears no resemblance to the Rasmer facts. In *Dow*, the Plaintiffs, whose addresses were readily available, were not personally notified of a tax foreclosure sale and were unable to attend or object to the action. *Id.* at 195. The *Dow* court held that since their contact information was easily ascertainable, notice by publication was not sufficient. *Id.* at 208. The Rasmer Estate, however, admits that it has had multiple opportunities, with sufficient notice, and has twice already had the opportunity to be heard, both in probate court and the Court of Appeals. (Estate's App for lv, p 4.)

The Estate moreover, claims that due process was violated because the family was denied the ability to do estate planning to shield assets when applying for Medicaid benefits. (Estate's App for lv, p 2.) Estate planning is not a constitutionally protected right that requires due-process protections. And in fact any financial planning that Olive Rasmer could have executed at the time of her

initial application could have been executed later to the same effect. Yet, the family did nothing to further attempt to shield assets from estate recovery. At the time of her application, in order to qualify, she had only her homestead and less than \$2,000.00 in other assets. She was at all times in control of those assets. After receiving the notice of estate recovery, she did not take any estate planning steps with those assets. The fact that she did not receive information about estate recovery on her first application did not disadvantage or prejudice her in any way.

Although the Estate has quoted a section of the *Gorney* decision to suggest some unfairness, as support for its due process claim (Estate's App for lv, p iii.), the Court was *not* addressing the issue of notice in that section. *Gorney*, ___ Mich App at ___, slip op at 10. Instead, the *Gorney* Court, was discussing the issue of the dates of "implementation" in MCL 400.112g(5) to reach a due process violation. The dates of implementation are not mentioned in the Rasmer Estate's application for leave. Related to this implementation, the *Gorney* Court held that "[b]etween July 1, 2010, and July 1, 2011, the date on which the plan was actually "implement[ed]," the decedents lost the right to choose how to manage their property," *Id.*, a holding disputed by the dissent. *Id.*, slip op, dissent at 3-4. The Department has applied for leave to appeal related to this issue, which has no bearing or relationship to issues raised by the Rasmer Estate.

CONCLUSION AND RELIEF REQUESTED

The Department met every requirement of state and federal law and policy in pursuing a Medicaid estate recovery claim in the Estate of Olive Rasmer. Richard Rasmer received all necessary information before seeking continuing eligibility for Olive Rasmer. When the Department presented the claim, the Estate had the opportunity for a hearing, and all due-process protections were observed.

Based on *In re Estate of Keyes*, the Court of Appeals correctly determined that the Department had provided sufficient and timely notice to this Estate. There are no conflicts and no corrections for this Court to make. This Court should deny the Estate's application for leave to appeal, just as it denied the application in *Keyes*.

Respectfully submitted,

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